RE: CHAN KOK PUN; EX P MALAYAN BANKING BHD

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[BANKRUPTCY NO: 29-339-2007]
19 SEPTEMBER 2013

BANKRUPTCY: *Notice - Setting aside - Extension of time to set aside bankruptcy notice and creditor's petition - Whether allowed by Deputy Registrar - Appeal against decision - Whether judgment debtor aware of bankruptcy proceedings - Whether service of bankruptcy notice via substituted service valid and effective - Calculation of interest - Whether failure to state base lending rate rendered bankruptcy notice invalid - Whether judgment debt correctly calculated - Bankruptcy Act 1967, s. 3(1)(i)*

This was an appeal by the judgment creditor ('JC') against the decision of the learned Deputy Registrar ('DR') allowing the judgment debtor's ('JD') application for extension of time and to set aside the bankruptcy notice ('BN') issued against the JD. A further appeal was filed against the decision of the DR to allow a similar application by the JD to set aside the creditor's petition ('CP'). The BN issued in this case was premised on a default judgment obtained by the JC *vide* a civil action dated 8 November 2006. The JD did not file any application to set aside the judgment, and therefore, the judgment was a final judgment which remained valid and subsisting. The JD alleged that he was unaware of the bankruptcy proceedings until he was served with the CP on 3 March 2008. The BN was duly served on the JD by way of substituted service ('SS') as ordered by the court. There was also no application made by the JD to set aside the service of the BN by SS. The main contention advanced by the JD was that the BN demanded the judgment sum together with interest at the rate of 2% per annum plus the base lending rate ('BLR') amounting to RM6,089.51. The judgment was for a sum of RM147,080.90. The BN did not state the rate of the BLR that was used to calculate the arrears of interest owing. As such, the JD contended that the BN was bad in law, invalid and void *ab initio*. The JC, however, contended that the rate of interest had been agreed at 2% above the BLR when the JD acknowledged and accepted the JC's letter of offer dated 18 September 2000. The prevailing BLR at the time the BN was issued was 8.75% per annum which was used to calculate the arrears of interest. The issue that arose for consideration was whether the failure to state the rate of the BLR figure which was used to calculate the interest due and payable in the BN by itself rendered the BN invalid and bad in law.

Held (allowing appeals with costs):

(1) The fact that the JD was unaware of the bankruptcy proceedings until service of the CP was devoid of merits and not a valid ground for the purpose of setting aside the BN or the CP. No application was made to set aside the service of the BN or the order for SS. Hence, the said service by SS was valid and effective that would in law be deemed to have brought the BN to the notice of the JD. A bare assertion that the JD was unaware of the proceedings until service of the CP was not a valid ground to oppose the BN that was duly served in accordance with a court order. (paras 8 & 10)

(2) The rate of interest imposed by the JC in the BN was not only within the ambit of the clauses of the letter of offer but was in compliance with the judgment pursuant to which the BN was issued. Hence, the amount demanded could not be considered to be excessive or unlawful. Therefore, the issue of overcharging would not arise. (para 14)

(3) The mere failure to specify the BLR in the BN did not render the BN defective and a nullity. By quantifying the total sum due and payable under the judgment, inclusive of interest calculated up to the issuance of the BN, the JD was given ample notice of what was being claimed from him. Hence, the question of the demand in the BN being in non-compliance with the terms of the judgment did not arise. (para 19)

(4) The BN was in accordance with s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act') and could not be considered to have infringed its provisions merely on the ground of non-specification of the BLR. The judgment debt, inclusive of the interest as correctly calculated pursuant to the judgment, on which the BN was founded, existed as an enforceable debt for the purpose of the bankruptcy proceedings. Therefore, the failure to comply with the BN within the stipulated period of seven days upon service constituted an act of bankruptcy committed by the JD. (para 20)

(5) The JC was entitled in law to enforce the judgment, which had not been set aside or stayed, by recourse to a BN based on the judgment that was valid and enforceable. The BN was valid and good in law and was not void *ab initio* and was served on the JD in the prescribed manner under the Act. As such, the DR had erred in law in allowing the applications by the JD to set aside the BN and the CP. (paras 21-23)

Case(s) referred to:

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(dist)***

Koh Thong Kuang v. United Malaysian Banking Corporation Berhad [1994] 4 CLJ 488 SC ***(refd)***

Lee Bak Soon v. RHB Bank Bhd [2008] 1 CLJ 237 CA ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(dist)***

Re Yeap Chee Fun, Ex P Pernas Trading Sdn Bhd [2000] 5 CLJ 280 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i)

For the judgment creditor - S Jeyakumar; M/s Ali Zaitun & Baharudin
For the judgment debtor - Francis Goh; M/s Francis Goh & Co

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy JC:

[1] This is an appeal by the judgment creditor ('JC') against the decision of the learned Deputy Registrar ('DR') allowing the judgment debtor ('JD')'s application for extension of time and to set aside the bankruptcy notice ('BN') issued against the JD. A further appeal was filed against the decision of the DR to allow a similar application by the JD to set aside the creditor's petition. Both appeals will be dealt with together as the grounds of both the applications and the issues arising are identical.

Factual Background

[2] The BN issued in this case was premised on a judgment obtained by the JC in a Johor Bahru Sessions Court civil action dated 8 November 2006. The judgment obtained by default has yet to be set aside to date. No application was at any time filed by the JD to set aside the judgment. It, therefore, is a final judgment that remains valid and is subsisting.

[3] The JD alleged that he was unaware of the bankruptcy proceedings until being served with the creditor's petition ('CP') on 3 March 2008. Again, there was no attempt made to apply to set aside the judgment.

[4] The BN was duly served on the JD by way of substituted service ('SS') as ordered by the court. It was served by posting the BN at the JD's last known address on 14 November 2007, posting at the court notice board on 7 November 2007 and advertisement in a local newspaper on 2 November 2007. There has been no application to date to set aside the service of the BN by SS.

Grounds Of Application

[5] The main ground of challenge advanced by the JD was that the BN demanded from the JD the judgment sum together with interest at the rate of 2% per annum plus the base lending rate ('BLR') amounting to RM6,089.51. The judgment was for a sum of RM147,080.90. The BN does not state the rate of the BLR that was used to calculate the arrears of interest owing. As such, the JD contended that the BN was bad in law, invalid and void *ab initio*.

[6] Secondly, the JD contended that he did not have any knowledge of this proceedings until he was served with the CP dated 28 January 2008 on 3 March 2008. He filed these applications as soon as his solicitors received the cause papers from the JC's solicitors.

[7] In the affidavit in reply by the JC it was deposed that the rate of interest had been agreed at 2% above the BLR when the JC acknowledged and accepted the JC's letter of offer dated 18 September 2000. The prevailing BLR at the time the BN was issued was 8.75% per annum which was used to calculate the arrears of interest.

Finding Of Court

[8] The contention of the JD that he was unaware of the bankruptcy proceedings until service of the CP was devoid of merits and not a valid ground for the purpose of setting aside the BN or the CP. The BN was duly served on him by way of SS pursuant to a court order. No application was made to set aside the service of the BN or the order for SS. Hence, the said service by SS was valid and effective that would in law be deemed to have brought the BN to the notice of the JD. The issue of whether the JD actually came to know of the BN is an irrelevant factor. In *Re Yeap Chee Fun, Ex P Pernas Trading Sdn Bhd* [2000] 5 CLJ 280, Abdul Hamid Mohamad, J (as he then was) held:

> I am not aware of any such proposition of law. Where an order for substituted service is made the issue is not whether the judgment debtor knows about the bankruptcy notice or not, but whether the order for substituted service is correctly made and the subsequent service is in accordance with the order or not. The judgment debtor

> may or may not know about it at the time when the substituted service is made. No actual knowledge need be proved. The fact that the judgment debtor is not aware of the bankruptcy notice, even if it is true, does not nullify service.

[9] On the efficacy of the substituted service procedure, the learned judge referred to the Supreme Court case of *Koh Thong Kuang v. United Malaysian Banking Corporation Berhad* [1994] 4 CLJ 488; [1994] 3 MLJ 509.

[10] In the instant case, the objection raised as to the service of the BN was manifestly insufficient to nullify the service by SS. A bare assertion that the JD was unaware of the proceedings until service of the CP was, to my mind, not a valid ground to oppose the BN that was duly served in accordance with a court order.

[11] The principal ground of objection against the BN and the CP was that the BN does not state what is the rate of the BLR used to calculate the interest charged as at the date of issuance of the BN. What it states is as follows:

> Faedah pada Kadar 2% + BLR yang dikira dari 15/08/2006 sehingga 31/01/2007.

[12] However, the BN quantifies the amount of interest charged from 15 August 2006 till 31 January 2007 as RM6,059.51. The specific period for which interest has been charged is clearly stated. There was no dispute that the amount demanded in the BN is consistent with the judgment on which it is based. The issue was whether the failure to state the BLR figure which was used to calculate the interest due and payable in the BN by itself rendered the BN invalid and bad in law. The judgment allows interest to be charged at 2% above the BLR on the judgment sum which was exactly what was done in the BN with the total amount of accrued interest as at the material date being stated.

[13] The deponent of the JC's affidavit in reply stated that the prevailing BLR at the time of the BN was 8.75% per annum. The JC also referred to the letter of offer dated 18 September 2000 issued to the JD wherein the provision on interest rate states:

> Base Lending Rate + 1.5% per annum with daily rest. Currently the Bank's Base Lending Rate is 6.5% per annum. The above interest rate may be varied at any time at the Bank's discretion.

Apart from the above provision which provides the power to charge interest, the JC invoked the governing clause in the event of recall of the overdraft facility [the facility granted to the JD in this instance] which allows the JC to impose higher interest rate at its discretion in the event of recall.

[14] The rate of interest imposed by the JC in the BN is not only within the ambit of the above two clauses of the letter of offer but more importantly, it is in compliance with the judgment pursuant to which the BN was issued. Hence, the amount demanded cannot be considered to be excessive and/or unlawful. The issue of overcharging would, therefore, not arise.

[15] In support of his contention with regard to the BLR the JD made reference to the case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104; [2000] 2 AMR 2325 where the Court of Appeal, *inter alia*, held:

> It is a condition precedent to the exercise of bankruptcy jurisdiction, that a BN shall require a debtor to pay a judgment debt in accordance with the terms of the judgment upon which the BN is founded. On the facts, the appellant's complaint was that the BN had not been issued in accordance with the judgment and not merely that the respondent had mistakenly claimed for more than what was actually due to it. The appellant's challenge of the BN thus fell well outside the scope of proviso (ii) to s. 3(2) of the Act, and was instead a jurisdictional challenge ie a separate and distinct head of challenge under s. 3(1)(i) of the Act. In this respect, the appellant had sufficiently made out his complaint, and had acted in accordance with the procedure prescribed under Rule 18 of the Rules. In the circumstances, the BN was therefore a nullity as at the date of its issue. When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction. The consequences of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and void *ab initio*. Hence, a debtor does not commit an act of bankruptcy if he makes default upon such a notice.

[16] The JD further cited in support the Supreme Court case of *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263 where it was held:

> By demanding payment for unspecified sums in the bankruptcy notice, such demand is not in accordance with the terms of the judgment and applying the rule of strict construction the notice cannot be deemed to fall within section 3 (1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven day period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and failure to comply with such a notice is not an act of bankruptcy and a bankruptcy petition founded on it must necessarily fail.

> It cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interest and costs, on which the bankruptcy notice was founded, did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy and that being the case, the bankruptcy notice was a nullity *ab initio* and the appellant is entitled to succeed.

[17] Counsel for the JC pointed out that the above two cases are easily distinguishable from the present case. In *J Raju M Kerpaya* (*supra*) the Court of Appeal set aside the BN as it included a claim for "penalty interest calculated at varying rates" as well as a claim for stamp duty that was not provided for in the judgment. These were held to be illegal claims which went beyond the terms of the judgment. In *Low Mun* (*supra*) the quantum of interest payable was not calculated and specified in the BN. Neither was the amount of costs specified. As such the Supreme Court held that, "non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice".

[18] Reverting to the instant case, I agree with the contention that the factual situation here differs significantly from the above two cases which were decided on their own facts. The JC here has fulfilled the condition of quantifying the principal amount, the interest and judgment costs in the BN. None of these amounts was shown to be incorrect or excessive as at the date of issuance of the BN. The debt claimed in the BN was an ascertained sum that had strictly adhered to the terms of the judgment and not shown to have gone beyond the judgment or to have claimed sums not provided for in the judgment.

[19] In my view, the mere failure to specify the BLR in the BN did not render it defective and a nullity. The JC had not in the BN demanded payment for unspecified sums contrary to the terms of the judgment. By quantifying the total sum due and payable under the judgment, inclusive of interest calculated up to the issuance of the BN, the JD was given ample notice of what was being claimed from him to be due and payable on the whole judgment debt. Hence, the question of the demand in the BN being in non-compliance with the terms of judgment did not arise. The BN had sufficiently complied with the terms of s. 3(1)(i) Bankruptcy Act 1967 ('the Act') applying the rule of strict construction. The relevant part of s. 3(1)(i) states:

> 3(1) A debtor commits an Act of bankruptcy in each of the following cases:
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of

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> the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of the bankruptcy notice ...

B **[20]** The BN in demanding payment of the judgment debt as adjudged together with interest quantified up to the date of the BN was clearly in accordance with s. 3(1)(i) and could not be considered to have infringed its provisions merely on the ground of non-specification of the BLR. The total amount specifically set out as owing by the JD under the C judgment was properly and adequately brought to his knowledge. It cannot be disputed that the judgment debt, inclusive of the interest as correctly calculated pursuant to the judgment, on which the BN was founded existed as an enforceable debt for the purpose of bankruptcy proceedings being instituted. The BN could, thus, be deemed to fall within s. 3(1)(i) of the Act and it followed that, failure to comply with D the BN within the stipulated period of seven days upon service constituted an act of bankruptcy committed by the JD.

[21] On the right of the JC to enforce a judgment that had neither been set aside nor stayed, reference was made to the judgment of the E Court of Appeal in *Lee Bak Soon v. RHB Bank Bhd* [2008] 1 CLJ 237; [2008] 1 MLJ 762 where it was held:

> The O. 14A judgment which led to the JC's request for the issue of the bankruptcy notice against the JD was a final judgment. As the JD had not appealed nor obtained a stay of execution, the JC was entitled F to enforce the final judgment (see para. 14).
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> There was no dispute that the JD's bankruptcy notice as in the prescribed form had stated the consequences of non-compliance therewith and had been served in the prescribed manner under s. 3(2) of the Bankruptcy Act 1967 (see para. 15).
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> The grounds stated in the JD's application was premised on the auction suit which had proceeded to the then Supreme Court ('Supreme Court appeal'). Further, the JD had not lodged any appeal against the final judgment obtained by the JC under O. 14A in the civil suit which led to the issuance of the bankruptcy notice against the JD. H The grounds raised in the JD's application should have been ventilated in the civil suit, the auction suit or the Supreme Court appeal. The JD's failure, refusal or neglect to do so would in the court's view militate against the JD's appeal before the High Court and now in the instant appeal in so far as the bankruptcy notice is concerned. It also represented a total lack of *bona fide* on the part of the JD (see para. 21).
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> It was obvious that the JD had failed to comply with the requirements of the JC's bankruptcy notice. Consequently, he had committed an act of bankruptcy and as such the High Court arrived at a correct decision in dismissing the JD's application (see para. 26).

[22] Likewise, in the instant case, the JC was entitled in law to enforce the judgment, which had not been set aside or stayed, strictly in accordance with its terms, by recourse to a BN based on the judgment that was valid and enforceable. No justification was shown by the JD to go behind the judgment.

Conclusion

[23] On the foregoing grounds, I held that the BN in this case was valid and good in law. It was not void *ab initio* for the reasons advanced by the JD and was served on the JD in the prescribed manner under the Act. I, therefore, held that the learned DR had erred in law in allowing the applications by the JD to set aside the BN and the CP. I, accordingly allowed both appeals with costs of RM1,000 and set aside the orders of the DR.